United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2175

DOCKET NO. 76-2175

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JESSE KETCHUM, M.D.,

Appellant,

vs.

BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York; EDWARD C. COSGROVE, District Attorney of Erie County, their agents, successors, and those acting in concert with them,

Appellees.

BRIEF OF APPELLANT

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APPELLEES.

BRIEF OF APPELLANT

JURISDICTION OVER THE APPEAL FROM THE DENIAL OF APPELLANTS'S PETITION FOR WRIT OF HABEAS CORPUS

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 2253, which provides that in a habeas corpus proceeding before a district judge, the final order is subject to review on appeal by the Court of Appeals. The United States District Court for the Western District of New York, Judge John T. Curtin presiding, issued a final order on November 5, 1976, denying appellant's petition for a writ of habeas corpus. Ketchum v. Ward,

Civ. No. 75-79 (W.D.N.Y. 1976). Appeal from such final order lies directly to this Court.

ISSUES PRESENTED FOR REVIEW

I

Whether the Criminally Nelgigent Homicide Statute, in New York Penal Law §15.05(4), 125.10, As Invoked in a Surgical Death Case Involving a Legal Abortion in 1971, was Unconstitutionally Vague as Applied to Appellant?

II

Whether Prosecutorial Misconduct In the Trial And Summation Was So Grievous And Systematic As to Violate the Fourteenth Amendment Guarantee of A Fair Trial?

III

Whether Appellant Sufficiently Exhausted State Remedies on All Issues Raised in the Court Below?

STATUTES AND INDICTMENT INVOLVED

N.Y. Penal Law §125.10, at 244 (McKinney 1967) provides:

> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

N.Y. Penal Law §15.05, at 21 (McKinney Supp. 1973-74), provides in pertinent part:

> "4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense

when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." (Emphasis added).

The provision of the indictment on which Dr. Ketchum was convicted states:

"...THE GRAND JURY OF THE COUNTY OF ERIE, by this indictment, accuse JESSE KETCHUM of the following crime:

"Criminally Negligent Homicide, in that he, the said JESSE KETCHUM, on or about the 16th day of June, 1971, in the County, with criminal negligence, caused the death of Margaret Louise Smith by his choice of a surgical procedure, to wit: a vaginal hysterotomy, under all the circumstances of this case and by failing to care for and provide for her proper medical care, after that procedure was utilized (Emphasis Added).

Statement of the Case

Dr. Jesse Ketchum was convicted of criminally negligent homicide on October 26, 1973, in the Erie County Supreme Court. The conviction was affirmed by the New York State Supreme Court, Appellate Division, People v. Ketchum, 45 App. Div. 2d 820, 358 N.Y.S.2d 353 (4th Dept. 1974), and also by the New York Court of Appeals. People v. Ketchum, 35 N.Y.2d 740, 361 N.Y.S.2d 911 (1975). A petition for writ of certiorari was denied by the United States Supreme Court on February 18, 1975. 420 U.S. 928 (1975).

Dr. Ketchum then applied for a writ of habeas corpus in the United States District Court, Western District of New York. This was denied in Ketchum v. Ward, Civ. 75-79 (W.D.N.Y. Nov. 5, 1976). Dr. Ketchum appeals, seeking reversal of the lower court's denial of his application for writ of habeas corpus.

Dr. Ketchum received his M.D. degree from the University of Toronto in 1943. He became specialty certified by the American Board of Obstetrics and Gynecology, and has practiced in that field for over twenty-five years.)R IV:2460).

Dr. Ketchum came to New York from Detroit in 1970 after passage here of the first abortion-by-consent statute in the United States, N.Y. Penal Law §125.05. That law provided:

> "3. 'Justifiable abortional act.' An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician ... within twenty-four weeks from the commencement of her pregnancy."

The law expressly permitted a physician to perform an abortion upon a requesting patient prior to the 24th week. There was no requirement that the physician do the procedure in any particular kind of facility, such as a hospital or surgicenter. This was intentional.

The official Commentary to the statute pointed out that a few States required hospitalization or patient residency, but that N.Y. Penal Law §125.05 "contains neither hospital nor residence requirements." Id.

Similarly, New York courts periodically referred to his unambiguous fact:

> "Abortions were legalized in New York State in 1970 (Penal Code, §125.05 [L. 1979, ch. 127] and outside New York City they may be performed in doctor's offices (Rubin v. Incorporated Vil. of Hempstead, 30 N.Y.2d 347, 334 N.Y.2d 129, 285 N.Y.2d 285. "People v. Dobbs Ferry Medical Pavillion, 40 App. Div. 2d 324, -, 340 N.Y.S.2d 108, 110 (2d Dept), aff'd, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

Dr. Ketchum began his practice in Buffalo, New York, in the professional medical building at 50 High Street across the street from Buffalo General Hospital (R II:869, 969).

In Buffalo, Dr. Ketchum specialized in abortion practice. He received referrals from clergy, priests, ministers and local physicians (R I:578).

The climate in Buffalo, however, was apparently not favorable to open, legal abortion practice outside of the hospital. Although abortion had been legal for a week, Dr. Ketchum was raided at his first office on July 6, 1970, by the same police officer who investigated this case a year later. (R II:906, 908).

After the July 6, 1970, raid, Dr. Ketchum continued his medical practice. Then, on June 16, 1971, patient Margaret Louise Smith expired after an abortion, and Dr. Ketchum was subsequently indicted for criminally negligent homicide, N.Y. Penal Law §§15.05, 125.10.

This case is the only known instance in which a physician has been prosecuted in connection with a death from a legal abortion. There were 29 deaths from 446,052 legal abortions in New York State from July 1, 1970, to June 30, 1972, but no other physician was prosecuted.

Margaret Louise Smith, the deceased, came with her common law husband, Billy Ray Ellenburg, from Ypsilanti, Michigan, to Buffalo, New York, on the morning of June 16, 1971. Her abortion procedure was performed by Dr. Ketchum some time after 10 o'clock a.m. (R I:416)

One of Dr. Ketchum's assistants, Judith Nicosia Hassett, testified that "nothing was abnormal" (R I:512) when she checked on the patient around noon. On a subsequent routine check, however, she spoke to the patient and saw that there was "bleeding enough to worry me and to summon the doctor." (R I:516).

Dr. Ketchum "went immediately into the room with Margaret Smith (Id.) He responded "instantaneously" when summoned. (R I:564). There was no evidence to the contrary.

Nonetheless, the patient's condition became such that Dr. Ketchum asked that an ambulance be summoned to take her to the Buffalo General Hospital across the street (R I:527). This was done, but the patient unfortunately expired and was pronounced dead on arrival.

By 5:45 p.m. Lt. Leo J. Donovan, Chief of Homicide, who had raided Dr. Ketchum the year before, was at the doctor's office with four other officers. (R III: 901, 909). No Miranda warnings were given. (Id. at 902). The officers "secured" the offices (Id. at 850), took various charts and other items (Id.at 966), and questioned Dr. Ketchum. (Id. at 658, 670, 673, 675,910, 954, 964).

That evening an autopsy was performed, with Lt. Donovan present. (R I:261).

A grand jury investigation and indictment followed.

At the trail Dr. Ketchum defended, through counsel and expert testimony, on several grounds.

First, the statute and indictment provided no fair notice of the conduct charged. As defined, criminally negligent homicide entails failure to perceive "a substantial and unjustifiable risk," N.Y. Penal Law §15.05(4), that death will occur, and a "gross deviation" from a "reasonable" "standard of care."

The indictment provided little further illumination. It charged Dr. Ketchum with performing a "vaginal hysterotomy" which was not the procedure shown by the autopsy at all, as appears more fully hereinafter.

The indictment also used the open-ended term: "under all the circumstances of this case." Which specific circumstances? This provided the defense with utterly no warning whether fault was to be charged in regard to anesthesia, oxygen use, laboratory tests, intravenous liquids, or any other aspect of the clinic, Dr. Ketchum's practice, or his staff. A bill of particulars was of no aid.

Details of the prosecution's prima facie case did not begin to emerge clearly until the trial, and these continued to vary throughout the proceedings. They showed a very sharp dispute as to what happened the day the patient expired.

Apparently the prosecution theorized that the patient had been more than 12 weeks pregnant (R I:58), that a vaginal hysterotomy procedure (Id. at 55), had been performed, that such a procudure was not standard in the local medical community (Id. at 61), that there were not but should have been blood or blood derviatites in Dr. Ketchum's clinic (Id. at 60), that during the operation there was a tear in the cervix which was only partially sutured

and from which the patient did bleed (Id. at 60), that Dr. Ketchum did not adequately locate the source of bleeding, that the patient expired as a consequence, and that the sum total came to criminally negligent homicide.

The defense was straightforward.

Counsel repeatedly attempted to ascertain the detailed basis of the criminal charges, all to no avail, as appears in the next section.

Expert testimony and medical texts were introduced to show that the medical procedure done was not a "vaginal hysterotomy," but a simple D&C. (R III:1478, II:1059, II:755-756). The prosecution charged the wrong operative procedure, as much so as if an appendectomy had been alleged.

Defense counsel showed that there were no pre-existing definite legal standards regarding the performance of abortions in New York in 1971. Indeed, the New York Court of Appeals had held the only set of regulations unconstitutionally vague in People v. Dobbs Ferry Medical Pavillion, 33 N.Y.2d, 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973), before the trial of this case.

Estimations of the patient's pregnancy ranged from 12 to 20 weeks, according to the witness, and testimony showed the uncertainties in making such estimates. (R III:1488, 1502, II:1041).

By expert testimony and cross-examination of prosecution witnesses, defense counsel sought to establish that this had been a case of sudden uncontrollable bleeding caused by amniotic fluid embolism. The medical details of this defense go beyond the

scope of this proceeding, but, briefly, such a cause of death is uncommon, although not rare, and is beyond the physician's control. (R III: 1693-1700, III:1500).

In lay terms, amniotic fluid is the waterlike substance in the sac which holds the fetus. If this fluid gets into the woman's bloodstream, it goes to the lungs and usually causes the blood to cease clotting. Death by uncontrollable bleeding over minutes or hours is the result (R III:1693-1696).

Two experts with background experience concerning amniotic fluid embolism testified that this was a cause of death here. (R III:1700, 1500). This was the logical explanation put forth by the defense, but which did not prevail.

ARGUMENT

I.

The Criminally Negligent Homicide Statute, N.Y. Penal Law §§15.05[4], 125.10, As Invoked in This Surgical Death Case Involving a Legal Abortion in 1971, Was Unconstitutionally Vague as Applied to Appellant.

A. STATUTORY LANGUAGE

Under New York law criminally negligent homicide, a 1967 vintage offense, is defined as occurring "when, with criminal negligence, [one person] causes the death of another person." N.Y. Penal Law §125.10, p. 224 (McKinney 1967).

"Criminal negligence" is defined by N.Y. Penal Law §15.05[4] as the fourth degree of culpability descending from "Intentionally" to "Knowingly" to "Recklessly." The definition states:

> "4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. L. 1965, c. 1030, eff. Sept. 1, 1967." (Emphasis added).

The statute does not provide any means for ascertaining the applicable standard of care, nor for determining where to look for such criteria and standards.

The statute is uniquely and wholly generic in terminology.

It identifies no specific acts or omissions as proscribed, nor does it suggest a mechanism for ascertaining such details with specificity.

The uncertainties regarding standard of care also apply to identifying a "gross deviation" from such a standard.

The degree of "substantial and unjustifiable risk" is unclear as well, particularly with reference to this case. There are no guidelines whereby a physician can determine whether the "risk" is of the surgical procedure itself, or of theoretical complications therefrom.

The physician has no way of knowing, for example, whether a ?substantial and unjustifiable risk" means 0.1%, 1%, 10%, 50%, or 75% risk of mortality, or risk of complication, or risk of mortality from complication, as opposed to mortality directly from the surgical procedure itself.

Similarly, the physician cannot know whether the statutory "risk" allows him to discount the inevitable physical and mental risk to the patient of continuing an unwanted pregnancy. Maternal mortality from conditions associated with term pregnancy was 20.5 per 100,000 in 1971. Statistical Abstract of the United States 1973, Table 82. p. 59.

The grand jury, prosecutor, judge, and jury all have differing perspectives and are given boundless discretion in applying the statutory definition of "criminal negligence" to a given set of facts and circumstances.

As to applicable standards of care, they may pick and choose

among state, county, and city health and hospital codes. Alternately, they may look to generalized policy statements from local, state, national, or international organizations such as medical or public health associations.

Similarly, they may decide to rely on testimony by local physicians about how they and/or their colleagues practice.

Finally, they may determine that an acceptable standard is that of the majority only, or perhaps of a reasonable minority, or that of any single physician with knowledge and experience in the particular surgical procedure, or something else.

The statute, on its face and as applied to the area of medical practice, simply provides no guidance on where to look and when to stop looking for acceptable medical practices and standards. Grand jurors, prosecutors, judges, and jurors may pick their own standards from any of the above sources, or from personal preference of bias.

The dearth of medical experience with abortion as of 1971, and the deep emotional and religious feelings about abortion, further complicate the task of selecting clear, reasonable, and pre-existing standards.

Determination of degree of unacceptable "risk" may also vary sharply amoung grand jurors, prosecutors, judges, and jurors. Moreover, laypersons and physicians without experience in a particular operation are uniquely unqualified to pass judgment on degree

of risk, particularly with no guidelines whatever, as here. It must not be forgotten that the mandatory hospitalization requirement for all abortions, suggested by the A.M.A. in 1970 and also in the People's Bill of Particulars here (R IV:2768) was squarely held medically unnecessary and unconstitutionally so by the Supreme Court of the United States after exhaustive deliberation in Roe v. Wade, 410 U.S. 113, 163-64 (1973), and Doe v. Bolton, 410 U.S. 179, 193-95 (1973).

Standards and risks change with time and experience. In medicine the majority view of today may be overturned as unconstitutional next week. Roe and Doe teach a lesson of humility which applies a fortiori with respect to the unwritten standards invoked on the basis of such vague and meager testimony against Dr. Ketchum.

In this case, the jury was free to adopt any physician's opinion as to what constituted a proper medical standard, and a gross deviation therefrom, even though Dr. Ketchum had no advance warning of what that opinion would be, since there were no legislative regulations, and those which did exist had been struck down as unconstitutionally vague in People v. Dobbs Ferry Medical Pavillion, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

B. THE VAGUENESS DOCTRINE

The Supreme Court has repeatedly held that:

> "[t]o avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed." Rabe v. Washington, 405 U.S. 313, 315 (1972).

Whereas in Rabe there was no fair notice that criminal liability depended upon the place a film was shown, here the statute had never even been applied in a medical setting, and provided no notice of medical standards and how they were to be ascertained.

The Supreme Court has also required that:

> "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt." Winters v. New York, 333 U.S. 507, 515-516 (1948); See also Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The court below attempted to clarify the Supreme Court language by evolving a new standard for vagueness. According to the lower court, if a statute is clear in meaning upon reading, or sufficient to warn one that he should seek legal advice to determine its meaning and applicability to him, then the state may charge such individual with knowledge of the law's applicability.

> "If a competent lawyer is consulted, he should be able to predict whether the statue might be used as a basis

> for prosecuting his client. If the words of the statute and other related law make it impossible to make such a prediction, a statute comes close to inadequate advance notice." Ketchum v. Ward, Slip Op. at 16, Civ. 75-79 (W.D.N.Y. Nov. 5, 1976)

The lower court, in applying this standard to the present case, found that a competent attorney would not advise a physician that he would not be indicted or found guilty by a jury for performing an abortion which led to the death of the woman. Id. at 18. "The court rules that the Statute as applied provided the petitioner with sufficient notice of the acts or omissions that might be subject to criminal prosecution." Id. at 19.

Appellant contends that the lower court improperly applied the vagueness standard which it espoused, and that the lower court erred in finding the statute in question constitutional as applied to him.

Competent attorneys are ordinarily not trained in medicine. Indeed, in 1971 few gynecologists were experienced in abortion technique. Few attorneys would have the qualifications to advise a client, under the facts of this case, that the negligent homicide statute would be used to prosecute a client based on the type of abortion performed, or care provided. No standard of care existed at this time as to particular methods of abortion. And no physician had ever been charged with negligent homicide in the performance of a particular type of abortion. Certainly there was no evidence that the technique employed was one with any substantial risk to a patient. Under the facts of this case, the words of the statute and other related law make it impossible for an attorney for an attorney to predict that the statute would be

used as a basis for prosecuting the physician. Thus the statute gave inadequate advance notice, and is unconstitutionally vague. The "rough idea of fairness" is violated by such application. Colten v. Kentucky, 407 U.S. 104, 110 (1972).

C. NO STANDARD OF CARE EXISTED TO GIVE NOTICE THAT THE ACTS CHARGED MAY BE CRIMINAL

Furthermore, the lower court erred in rejecting Dr. Ketchum's argument that there was insufficient proof of a specific, valid standard of care. The lower court felt that the jury had sufficient evidence before it to find that there was an uncodified standard of care, and that appellant deviated from that standard. "The petitioner was on notice, or is properly charged with notice, of the standard of care that he should have followed with respect to his patient." Ketchum v. Ward, supra, Slip Op. at 23.

The opinion of the Supreme Court in Roe v. Wade, 410 U.S. 113, 141-148 (1973), shows the extent to which medical standards in the abortion field have shifted rapidly in the short space of a few years.

Discussing the position of the American Medical Association, 410 U.S. at 141-144, the Court noted a transition from "general supression" of abortion in the 19th century to a more permissive posture in 1967, allowing abortion for "health" reasons if "performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." 410 U.S. at 143. (The latter restriction, of course, was held unconstitutional in Doe v. Bolton, 410 U.S. 179, 193-95 (1973).).

Within the AMA, in 1970, Roe recalled, there were found by its study committees a "polarization of the medical profession on this controversial issue; division among those who had testified; a difference of opinion among AMA councils and committees; 'the remarkable shift in testimony' in six months ... and a feeling 'that this trend will continue.'" 410 U.S. at 143.

The AMA picture, then, was and is one of shifting standards. A similar pattern was found within the American Public Health Association and the American Bar Association. Roe v. Wade, supra, 410 U.S. at 144-47. While the mandatory hospitalization requirement of the 1962 Model Penal Code §230.3(2), was accepted by many States and the American Law Institute, experience proved the restriction unnecessary, and, ultimately unconstitutional. Doe v. Bolton, supra, 410 U.S. at 193-95. The Commissioners on Uniform State Laws, by 1972, had decided not to mandate hospitalization for abortion patients. Roe v. Wade, supra, 410 U.S. at 146-47 & nn. 40-41.

The numerous briefs of amici before the Court in Roe v. Wade 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), further illuminated the often philosophically-based differences of opinion on acceptable medical standards in the abortion field.

While the Brief for Amici Curiae American College of Obstetrecians and Gynecologists et al., pp. 80-90, cited in Doe v. Bolton, 410 U.S. 179, 193 n.13 (1973), argued that abortion was a relatively safe medical procedure which should not be restricted

to hospitals alone, sharply contrasting briefs were filed by other groups and physicians.

The Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology In Support of Appellees, filed jointly in Roe v. Wade and Doe v. Bolton devoted 26 pages to a section, Id., pp. 32-58, entitled "Medical Hazards of Legally Inducted Abortion." This Brief strongly opposed the position ultimately taken by the Court and went so far as to state: "The claim that abortion is X-times as safe as childbirth is a fabrication invented to sell abortion." Id. at p. 45.

It is apparent that notions of acceptable medical practice for the performance of abortions do vary widely and have changed greatly in recent years. A physician such as Dr. Ketchum should not be left to the mercy of local physicians' standards when a jury could adopt testimony directly at odds with the national constitutional standard enunciated in Roe v. Wade and Doe v. Bolton.

D. STRICTER STANDARDS OF VAGUENESS MUST BE APPLIED WHERE CONSTITUTIONAL RIGHTS ARE AT ISSUE

Dr. Ketchum also contends that the lower court erred in rejecting his claim that stricter standards of vagueness must be applied when dealing with conduct that is presumptively privileged under the constitution, on the ground that such "standard is restricted for statues which involve First Amendment freedoms and is inappropriate here." Ketchum v. Ward, supra, Slip Op. at 13.

In United States v. Mazurie, 419 U.S. 544 (1975), the Supreme Court stated that "It is well established that vagueness challenges to statutes which do not involve First Amendment freedom must be examined in light of the facts of the case at hand." 419 U.S. at 550. Such language relied on an earlier Supreme Court case which held that where a literal reading of a statute "is capable of reaching expression protected by the First Amendment, the vagueness doctrine demands greater specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). However, footnote 10 of this case gives examples of situations where the court has applied less stringent requirements.

Such cases dealt purely with economic regulations. The present case involves the constitutional right of abortion. It is appellant's contention that statutes which may reach the constitutional right to obtain and perform abortions must also be subject to a more stringent requirements of vagueness, as are statutes capable of reaching expression prohibited by the First Amendment.

The definitive note on vagueness by Professor Amsterdam observed that:

> "[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights Freedoms." 109 U.Pa.L.Rev. 67, 75 (1960).

Decisions such as NAACP v. Button, 371 U.S. 415, 438 (1963), have continued to reiterate that "[p]recision of regulation must

be the touchstone in an area so closely touching our most precious freedoms."

The argument raised here does not demand the impossible in specificity from the state in legislation or regulation, but only elementary and fundamental fairness. Appellant of course, agrees withthe statement by Judge Lumbard that "nothing prohibits the state from promulgating reasorable health and safety regulations surrounding abortion procdures," Abele v. Markle, 342 F. Supp. 800, 804 (D. Conn. 1972)(three-judge court invalidating Connecticut Abortion Law), provided the constitutional requirements of notice, publication, clarity, specificity, and Roe and Doe are met. However, the case we have here does not involve pre-existing standards. Dr. Ketchum operated according to his own best judgment, training, and experience of twenty-five years. He knew of no other standards than those of his training and personal skills. Without greater warning he could ot be fairly held to an after-the-fact evaluation brought about through the novel application of this statute.

E. IMPACT ON ROE V. WADE AND DOE V. BOLTON

The conviction in this case must be overturned in order to prevent the emergence of unreasonably restrictive local standards in communities hostile to abortion, and concomitant prosecutorial circumvention of Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973).

Abortion, like any other medical procedure, carries with it some risk of complications, and even death. The risk, however, is and has been found by the Supreme Court to be minimal. As Roe noted, "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." 410 U.S. at 149, n.44.

Roe also pointed out that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forego it, has largely disappeared." 410 U.S. at 149.

The prosecution presented no evidence to prove beyond a reasonable doubt that the surgical technique of Dr. Ketchum was as hazardous or moreso than continued pregnancy. This crucial comparison was never made. Yet Roe requires such a finding.

There was also utterly no evidence that the surgical procedure Dr. Ketchum used would pose a "substantial and unjustifiable risk" of death as required by the statute, N.Y. Penal Law §15.05[4].

In a true sense this omission resulted in "'a conviction based on a record lacking any relevant evidence as to crucial element of the offense charged ....'" Vachon v. New Hampshire, 414 U.S. 478, 480 (1974).

The prosecution of Dr. Ketchum is an effort to invent standards where there were none before and to incorporate such standards ex post facto into a felony criminal statute. If the effort succeeds, any community hostile to abortion can define malpractice

as restrictively as supporting testimony can be found, and prosecute any physician performing abortions for deviations from that standard. The net result will be to dilute Roe v. Wade and Doe v. Bolton to the point that patients seeking abortions and physicians willing to perform them are at the mercy of local community climate.

F. CASE LAW APPLICATION OF THE STATUTE

Since its effective date, September 1, 1967, the criminally negligent homicide statute has been applied in at least 20 reported decisions.

The constitutionality of the statute has been upheld in the State appellate courts, but always in the context of conduct clearly known to be on the border or at the core of statutory illegality.

In People v. Kealey, 33 N.Y.2d 818, 819, 350 N.Y.S.2d 909, 305 N.E.2d 918 (1973) (per curiam), aff'g 38 A.D.2d 1009, 331 N.Y.S.2d 354 (2d Dep't 1972) (per curiam), cert. denied, 415 U.S. 920 (1974), for example, according to the official report syllabus, the accused in an automobile death case argued "that section 125.10 of the Penal Law was unconstitutional on the grounds that it was vague, indefinite, and uncertain." 33 N.Y. 2d at 819. This contention was summarily rejected without opinion.' Defendant Kealey had been convicted of causing the death of two persons in an automobile crash. It was clear and daylight, but Kealey was drunk and speeding.

Kealey, like 16 of the 20 decisions found, is an easily distinguishable vehicular homicide case with malum per se conduct violative of published, clearly defined speed limits and red lights.

Unlike Kealey and other auto cases, the present case involves a constitutionally privileged sphere of conduct, an absence of published standards, a new area of legal medical practice, and sober conduct.

What is most striking, however, about the comparison between this and the vehicular homicide cases, is that Dr. Ketchum received exceptionally unkind and discriminatory treatment at the hands of the New York courts. Persons driving at excessive speeds, through red lights, while drunken or under drugs, were exonerated. Dr. Ketchum who is a teetotaler and was soberly practicing medicine, and who made uncontradicted efforts to save his patient, had the book thrown at him.

The other four New York decisions further illustrate the application of discriminatory standards to Dr. Ketchum, or no standards at all.

People v. Pinckeney, 38 A.D.2d 217, 328 N.Y.S.2d 550 (2d Dep't 1972), held that the illegal act of selling heroin to one who died from its injection did not violate N.Y. Penal Law §125.10. The Court reasoned that:

> "Although it is a matter of common knowledge that the use of heroin can result in death, it is also a known fact that an injection of heroin into the body does not generally cause death."

Is it not also known to every person that surgical performance of an abortion - at 10, 14, or even 18 weeks - "does not generally cause death."?

Noting that no legislation existed on death from drug use, the Pinckney court concluded: "In our opinion, if the Legislature had intended to include homicide by the selling of dangerous drugs, it would have amended the sections in the Penal Law relating to homicide..."

Similarly here, in 1967, New York repealed the death-by-abortion statute, formerly N.Y. Penal Law §1050, superseded by §125.20(3). Subsequently, in 1970, all restrictions on elective abortions performed by licensed phys cians were removed. Id., §125.05(3)(b). Mandatory hospitalization was rejected, and the New York Court of Appeals ultimately invalidated as vague the restrictions regulating abortion facilities.

Yet, Dr. Ketchum never received the benefit of such reasoning.

A second non-vehicular application of N.Y. Penal Law §125.10 was People v. Ebasco Services, Inc., 77 Misc. 2d 784, 354 N.Y.S.2d 807 (Sup. Ct., Queens Cnty 1974). The context was construction of a cofferdam in the East River, which collapsed causing the death of two workmen.

In dismissing as vague an indictment which charged "failing to properly construct and supervise construction." the State court criticized the "sparse factual allegations" and stressed the necessity for "particularity" in the light of "the highly technical nature of the evidence involved."

Also, the Court noted that "the requisite particularization may not be supplied by an amendment to the indictment by the

District Attorney." By contrast, here, the State has repeatedly referred to the bill of particulars for that purpose.

In the two final cases of the 20, indictments were upheld for 1) actually injecting heroin into a deceased, People v. Cruciani, 70 Misc. 2d 528, 334 N.Y.S.2d 515 (Suffolk Cnty Ct. 1972), and 2) physically restraining a child with pneumonia in bed for several days, until death ensued, People v. Henson, 33 N.Y.2d 63, 349 N.Y.S.2d 657 (1973). Both involved malum per se conduct of a clearly grievous and independently illegal nature.

While the above discussion of state court approaches is not determinative of the Federal questions here, it is instructive and the reasoning of some decisions is useful, at least to show a failure of the state appellate process. Most significant is the glaring fact that never before in New York was a physician prosecuted for a surgical death. Never in the case law of criminal negligence were standards set or suggested for the application to presumptively privileged conduct. The prosecution of Dr. Ketchum was a jurisprudential experiment in which he was the victim of vagueness and prosecutorial impropriety from the outset.

II.

Whether Prosecutorial Misconduct In The Trial And Summation Was So Grievous And Systematic As To Violate The Fourteenth Amendment Guarantee Of A Fair Finding.

The lcwer court found that the prosecutor's conduct was not so improper as to reflect a pattern of conduct which reslted in denial of a fair trial. The Court held that the trial errors could only be remedied by the state appellate courts in the exercise of their supervisory authority and not by a federal court by writ of habeas corpus. Ketchum v. Ward, supra, Slip. Op. at 35. Appellant is prepared to show that such a pattern of misconduct was so grievous as to amount to a denial of due process, and that the lower court erred in denying habeas corpus relief for the violation of a constitutional right by the prosecutor's conduct. Cupp v. Naughton, 414 U.S. 141, 146 (1973). The present case involves numerous unambiguous instances of prosecutorial misconduct and trial error which permeated the entirety of the pretrial and the trial. Scarcely one of the ABA Standards Relating to the Prosecutorial Function went unbroken.

A. IMPROPER CROSS EXAMINATION OF THE PRINCIPAL MEDICAL EXPERT WITNESS

and The Supreme Court has stated that "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "Few rights

are more fundamental than that of an accused to present witnesses in his own defense." Id. Dr. Ketchum contends that his right to call witnesses was seriously abridged by the treatment of his chief medical expert witness, Dr. Milan Vuitch of Washington, D.C., and that the lower court erred in finding the prosecutor's cross examination to be harmless error.

Dr. Vuitch was called as the primary defense medical expert concerning the central questions in the case. The direct testimony of Dr. Vuitch had been highly favorable to petitioner, and, if accepted, would unquestionably have required a verdict of not guilty.

The conduct of the prosecutor interferred with Dr. Ketchum's "right to offer testimony," In re Oliver, 333 U.S. 257 (1948), and right "to call witnesses in [his] own behalf," Chambers v. Mississippi, supra at 294 (1973), in a manner far more serious than that in Chambers or Oliver.

On direct examination it was shown that Dr. Vuitch had impressive qualifications and experience, both in Europe and in the United States. He was board-certified, had 34 years of surgical experience, and particularly had been trained in vaginal surgery.

Dr. Vuitch carefully explained precisely why the medical report conclusively showed no evidence of vaginal hysterotomy, but a tear. He explained how, when, why and where the tear probably took place. He went over his own experience with amniotic fluid

embolisms. He concluded from the medical photographs that the deceased patient had probably been from 12 to 14 weeks pregnant, a borderline first trimester case.

On cross-examination the prosecutor wasted no time in committing reversible error.

First, Mr. Cleary stated:

"Q As has Dr. Ketchum, you have had troubles with the law because of abortions, haven't you? (R III:1514) (emphasis added).

This suggested prior illegal conduct both by the witness and the accused. In light of the fact that United States v. Vuitch, 402 U.S. at 62 (1971), was on the books in the library downstairs, one can only assume calculated impropriety by the prosecutor.

Then Mr. Cleary asked:

"Q Have you been convicted, Doctor, for illegal abortions?" (R III:1514).

Before time for an objection, Dr. Vuitch acknowledged that he had been indicted. (Id.)

Defense counsel objected repeatedly and moved for a mistrial. (Id.) The trial court denied the motion without explanation, and briefly told the jury to disregard the line of questioning.

In People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969), cert. denied, 396 U.S. 846 (1970), it was held to be reversible error for a prosecutor, with knowledge of an acquital, to

cross examine a defendant concerning a criminal charge on which he has been acquitted. "This is in keeping with the general rule that knowing use of false evidence or allowing it to remain uncorrected denies due process." 299 N.Y.S.2d at 825. Furthermore, "witnesses deserve to be treated with proper respect." United States v. Fernandez, 480 F.2d 726, 741 (2d Cir 1973). The lower court pointed out that the dismissal of an indictment on remand against Dr. Vuitch was not reported. However, one would assume that a dilligent attorney would have checked the outcome of a case remanded by the Supreme Court particularly where he intends to suggest a conviction to impeach the witnesse's credibility. Such research would lead to the discovery of the dismissal of the indictment, and that there was no trial. One can only conclude that the prosecutor was aware of the dismissal of the charge, and chose to ignore it, particularly because his opening question referred to Dr. Vuitch having had "troubles with the law," and not "convictions." (R., Vol. III, at 1514).

Petitioner contends that the prosecutor engaged in bad faith in questioning Dr. Vuitch on indictments which he most likely was aware had been set aside. It is unthinkable to allow a prosecutor to ignore published decisions from the Supreme Court and their disposal on remand, while requiring Dr. Ketchum to defend himself on a charge of violating totally unpublished, indefinite, indeed, non-existent medical-legal standards.

The lower court further stated that "even if bad faith on the part of the district attorney were shown, this court does not

find constitutional error in the State evidentiary ruling." Ketchum v. Ward, supra, Slip Op. at 31. Such a statement completely disregards the Schwartzman, supra, decision. The conduct of the prosecutor displayed bad faith on his part, involving a serious constitutional violation of defendant's right to a fair trial. Such violation requires reversal of the conviction.

B. VERBAL ABUSE OF EXPERT WITNESS IN TRIAL AND SUMMATION

The prosecutor in summation portrayed the chief defense medical expert as a multiple criminal offender when, in fact, his conduct had been constitutionally privileged, and sanctioned by the courts.

This was seriously aggravated by the insulting manner in which the prosecutor referred to the witness. Below are some examples.

> "I am thankful you are in the District of Columbia." (R III:1531)
>
> "We all didn't come from Vienna, Doctor." (Id. at 1526).
>
> "But he is wrong and you are right from way down in Washington, D.C." (Id. at 1630).
>
> "We all have the distinctive impression how well you like yourself." (Id. at 1630).

The prosecutor suggested further that Dr. Vuitch openly ignored the law before Roe v. Wade (R III:1519), and performed abortions for any reason. (Id. at 1518).

During summation, the prosecutor charaterized Dr. Vutch as "[t]he Viennese sausage maker ..." (R IV:2334) and "an arrogant self proclaimed king of the abortionists ... coming here for nothing but to protect somebody else who may be looking for his record." (Id.) Dr. Vuitch was represented as saying: "I ignore it (the law) I have ignored it in the past. I take the law into my own hands. I do what I damn well please." (R IV: 2334).

The lower court found such conduct to be improper, but not sufficient to constitute a due process violation. The court felt that such remarks by the prosecutor were just "puffing", Ketchum v. Ward, supra, Slip Op. at 33, and the jury would discount such remarks as seller's talk. However, the Supreme Court has pointed out the dangers of such "seller's talk":

> "It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially assertion of personal knowledge are apt to carry much weight against the accused when they properly carry none." Berger v. United States, 295 U.S. 78, 88 (1975).

The remarks of the prosecutor, in isolation or taken with other trial misconduct, shows reversible error. Clearly, it interfered with Dr. Ketchum's "right to offer the testimony of witnesses ..." Washington v. Texas, 338 U.S. 14, 19 (1967).

C. VERBAL ABUSE OF DR. KETCHUM

The lower court made no reference to appellant's argument that the abuse of Dr. Vuitch was only exceeded by that which the prosecutor reserved for the Dr. Ketchum Appellant contends that such verbal abuse is further grounds for reversal of his conviction.

In summation the prosecutor represented that "in the case of Dr. Ketchum the abortions were not removed from the back alleys, from the hotel rooms ...." (R IV:2269-70).

Repeatedly Dr. Ketchum was accused in summation of practicing medicine solely for financial gain:

> "...[H]e has got to clear that table to put somebody else on it and to get another five hundred bucks." (Id. at 2293).
>
> "...[T]hat is why Ketchum performs this kind of procedure, it is simply money. You don't have to do many of them at $500 a copy each day to understand the kind of money that you and I don't even dream about." (Id. at 2295).
>
> "[Dr. Ketchum's] interest lies in the cash, in the certified check." (R IV: 2349).

The prosecutor in unprovoked summation accused Dr. Ketchum of "Playing Russian Roulette with somebody else's life ...." (R IV:2281).

Twice the prosecutor represented that Dr. Ketchum had been the cause of an unspecified change in the law:

> "[N]ow it is a crime to perform an abortion after 12 weeks outside of the hospital. That is to discourage anybody else who wants to make five hundred bucks a copy." (R IV:2327).

EDITOR'S NOTE

Pages 23 were missing at time of filming. If, when obtained, a corrected fiche will be forwarded to you.

During the trial, the prosecutor spoke the following words:

> "... For the very choice of his procedure, the danger signals, the red light should have been flashing on, the siren should have been going off in his head, I had better watch her. Not him, he sits there and placidly stares ahead. That is what he did then, just completely forgot about her, too busy. That is criminally negligent homicide." Ketchum v. Ward, supra at 34.

The lower court concluded that although the passage is ambiguous, the underlined sentence does not refer to Dr. Ketchum during the trial, but only on the day of the abortion. "This court does not interpret the comment as a reference to the fact that Dr. Ketchum did not testify." Ketchum, supra Slip Op. at 35. The difficulty with this conclusion is that the underlined sentence is stated in the present tense, while the events on the day of the abortion are stated in the past tense. It is unambiguous that the prosecutor referred to Dr. Ketchum sitting and placidly staring ahead at the trial, because the sentence after the underlined sentence is in the past tense. Thus the prosecutor was making note of the fact to the jury that Dr. Ketchum was sitting at the trail without testifying. Such a reference constitutes a violation of a defendant's constitutional privilege, and requires reversal of the conviction, just as this court recently reversed a conspiracy conviction in United States v. Burse, 531 F.2d 1151 (2d Cir. 1976). One of the factors contributing to the reversal was the fact that the prosecutor implied and came

close to remarking that the defendant failed to take the stand. There the prosecutor said "the defendant did not tell you about all the truths." 531 F.2d at 1154. Here, the prosecutors remarks, implying that the defendant did not testify also require reversal of the conviction.

E. FURTHER EXAMPLES OF SYSTEMATIC TRIAL IRREGULARITIES AND MISCONDUCT

There was much additional misconduct throughout the trial which the lower court made no reference. A few more examples will be cited to show that a clear pattern existed.

Use of Term "Unborn Child" or "Baby" by Prosecutor throughout Trial

From opening statement to summation the prosecutor repeatedly attempted to charaterize the fetus as an "unborn child" (R I:57) or a "baby" (R IV:2297). This was not a casual misstatement, but part of a systematic and repeated effort to appeal to community prejudice against abortion.

The trail court at one point gave a perfunctory direction that the term "fetus" be used (R I:284), but the prosecutor promptly led the deceased's common law husband to say that he "felt the baby move" (R I:407) the evening before the abortion.

Since the trial commenced September 5, 1973, several months after Roe v. Wade, 410 U.S. 113 (1973), it was inexcusable prejudicial error of serious magnitude to permit the prosecutor

repeatedly to appeal to feelings that a fetus was a "baby" or "unborn child." Such references were, in the Buffalo community, tantamount to calling the doctor a murderer for "the taking of fetal life ...." (R IV:2268).

Defense counsel objected consistently to these characterizations (R I:58, 284, 407). Nonetheless, the Court of Appeals held that the prosecutor's "grievous misconduct" "does not reflect a pattern throughout the trial." (Id.)

Petitioner submits that the "unborn child" and "baby" characterizations, repeated from opening statement to summation were part of the prosecutor's calculated pattern to prejudice the jury against Dr. Ketchum and his expert witnesses. There was no other explanation. There was no necessity to use such inflammatory terms. The prejudice certainly outweighed any claim to necessity.

Prosecutorial Overemphasis of Blood

The State attempted to have the best of both worlds with blood.

On the one hand, it was contended that the patient slowly bled to death and was ignored by a callous doctor and untrained staff. (R I:65 - "over a period of hours"; R IV;2279 - "the patient slowly bled out").

On the other hand, the prosecutor tried to protect a scene of blood "pour[ing] off the table in a steady stream and puddles on the floor." (R IV:2301).

No person has enough blood to pour out in a stream while bleeding over several hours.

Significantly, the prosecution made no quantitative analysis of the blood. That would not have inflamed the jury, or the court. Rather, each witness was encouraged to portray "a steady stream" (R I:425) of blood for dramatic effect.

The chief witness on blood was the decedent's boyfriend, lacking any experience in the medical field. The prosecutor described him as "[a] very simplistic kind of southern Georgia cracker kid ...." (R IV:2297). Yet, the young man had enough perception to admit that the fluid was not all blood, but could have been mixed with other fluids used in cleansing the patient.

So obsessed was the prosecution with blood that it was mentioned a full twenty-one (21) times in the response pleading before the U.S. Supreme Court, in an eighteen (18) page brief. By extrapolation from those august chambers to the lay jury box, one can readily infer the major inflammatory role played by blood at the trial.

Miller v. Pate, 386 U.S. 1 (1967), is appropriately the leading case on unfairness in repeatedly referring to blood. The Supreme Court in unanimous opinion on federal habeas corpus overturned a murder conviction where a pair of shorts stained with paint had been impliedly represented as blood-stained.

Here the prosecutor knew full well that no person had enough blood to bleed as long and as heavily as was acted out in summation and trial. The use of the "blood tactic" here bordered upon fraud on the court. Here as in Miller, the "gruesomely emotional impact upon the jury was incalculable." 386 U.S. at 5.

Blood had no relevance to this case beyond establishing, if possible, the cause of death. The extent of bleeding was grossly exagerrated and over-emphasized in a manner that never was tied to the charges in the Indictment.

F. THE CONDUCT OF THE PROSECUTOR REFLECTED A PATTERN OF CONDUCT WHICH RESULTED IN THE DENIAL OF A FAIR TRIAL

This Court has held that a combination of acts of prosecutorial misconduct may require reversal without consideration of whether a single act would have required reversal. United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). There, as here, the prosecution made improper comments on witnesses testimony. There, the prosecutor referred to his personal belief of defendant's guilt; here he referred to petitioner's failure to testify. Both cases involved several other acts of misconduct. Appellant contends that the lower court erred in holding the prosecutor's conduct to be ordinary trial errors, and not constitutional violations. Consideration of the combination of acts of prosecutorial misconduct requires reversal of the Dr. Ketchum's conviction, particularly since there was a close factual case. As this Court

has stated:

> "Error which may be deemed relatively minor in other circumstances may reach prejudicial proportions in a close factual case such as this." United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970).
>
> "Each case must be scrutinized on its particular facts to determine whether a trial error is harmless error or prejudicial error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error." 431 F.2d at 1069.

III.

Dr. Ketchum Sufficiently Exhausted State Remedies on All Issues Raised in the Court Below

In the petition for habeas corpus at the District Court level, appellant claimed not only that the statute was unconstitutionally vague, but that the statute, indictment, bill of particulars, and case law nowhere advised him of the elements of the offense. As a result, the prosecutor was continually able to shift the theory of his case, resulting in new elements of the crime being introduced throughout the trial. This was an objectionable means of applying the statute. The lower court refused to consider this "elements of the offense" argument, on the grounds that Dr. Ketchum had not explicitly so phrased the argument in State courts, and thus had failed to exhaust his state remedies for the purpose of federal habeas corpus relief. The court did not consider the "elements of the offense" argument ashhaving been included in the lack of notice argument.

Dr. Ketchum contends that the lower court erred in not hearing these "elements of the offense" arguments on the merits, on the ground that he had satisfied the exhaustion arguments.

A. LEGAL STANDARDS FOR HABEAS CORPUS REVIEW

The Federal Habeas Corpus Statute, 28 U.S.C. §2254(b), contains the exhaustion requirement and provides that a petitioner must have "exhausted the remedies available in the courts of the State ...." Exhaustion is not a jurisdictional matter, Fay v. Noia, 372 U.S. 391, 420 (1963), but derives from considerations of comity.

The central purpose of requiring exhaustion is to give State courts the initial "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Wilwording v. Swenson, 404 U.S. 249, 250 (1971).

Petitioners are not required to file "repetitious applications" in the state courts. Brown v. Allen, 344 U.S. 443, 449 n.3 (1953). Nor is the mere possibility of eventual state court success a bar to federal habeas corpus. Roberts v. LaVallee, 389 U.S. 40, 42 (1971).

While the same essential claim must have been presented to the state courts, it is substance, not specific words that control. Kirby v. Warden, 296 F.2d 151 (4th Cir. 1961). A petitioner need not city "book and verse on the Federal constitution." Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958).

Most pertinent here is the observation of the Supreme Court in Picard v. Connor, 404 U.S. at 277:

> "Obviously there are instances in which 'the ultimate question for disposition' ... will be the same despite variations in the legal theory or factual allegations urged in its support." (Emphasis added).

In the present case there are variations in theoretical terminology and supporting facts, but Respondents can claim no suprise, and further exhaustion would be a pointless exercise.

B. STATE COURT ARGUMENTS MADE

At trial, the affidavit of counsel supporting the Motion to Dismiss Indictment (R. IV:2489-2540) stated:

26) This indictment does nothing to inform us of what particular actions or instances of inaction on the part of the accused are being deemed criminal by the state." (Id. at 2498).

The trial judge denied this aspect of the motion with one conclusory paragraph. (Id. at 2773).

A second Motion to Dismiss Indictment (R IV:2780-2795), more specifically contended:

> "(a) The indictment and corresponding Bill of Particulars violate the defendant's rights to due process of law;
>
> "(b) The indictment is defective in that the statutes defining the crime charged are unconstitutional or otherwise invalid..." (Id. at 2780).

The supporting affidavit carefully analyzed the unconstitutional indefiniteness of the statute, indictment, and bill of particulars, repeatedly suggesting that the Fourteenth Amdnement standards were not being met. (Id. at 2781-2795, paras. (a) - (f), 15-18, 23, 26, 27, 30, 31, 34-40, 52-60).

Again the trial judge denied the motion, stating: [D]ue deliberation having been had thereon, the motion of the defendant is denied in all respects." (R IV:2798).

Immediately before trial, defense counsel renewed the above motions, and they were denied. (R. I:38).

A defense request for delineation of a prima facie case was denied. (R I:51).

At the close of all evidence, defense counsel renewed all motions and further moved for a mistrial. (R IV:2138).

These again were denied. (Id. at 2148). Such motions informed the prosecution that appellant was challenging the sufficiency of such items.

The "elements of the offense" claim is in substance essentially the same as the lack of notice claim, or statutory application claim, and further exhaustion would be a pointless exercise. The ultimate questions for disposition are the same, whether due process is violated by a vague statute, or by a vague indictment and bill of particulars. The idea behind both is that there was no reason for Dr. Ketchum to have been aware that he was committing a crime, and that the vagueness of the statute permitted the prosecutor to continually establish new elements as part of the crime charged. The "elements of the offense" claim is a direct by-product of the lack of notice claim. It is because of the vagueness of the statute that the prosecutor had such leeway. Because the two claims are so related, appellant has exhausted his state remedies for habeas corpus purposes by having presented the lack of notice claim in the New York Courts. Thus, the lower court erred in refusing to consider the "elements of the offense" claim on the merits.

C. REVIEW ON THE MERITS OF THE STATE'S FAILURE TO LIST THE ELEMENTS OF THE OFFENSE

Appellant's contention is that the statute, indictment, bill of particulars, and case law nowhere advised him of the elements of the offense. The indictment charged as follows:

"... The Grand Jury of the County of Erie, by this indictment, accuse Jesse Ketchum of the following crime:

"Criminally negligent homicide, in that he the said Jesse Ketchum, on or about the 16th day of June, 1971, in the County, with criminal negligence, caused the death of Margaret Louise Smith by his choice of a surgical procedure, to wit: a vaginal hysterotomy, under all the circumstances of this case and by failing to care for and provide for her proper medical care, after that procedure was utilized." (Emphasis added).

Multiple ambiguities appear in the statute and are compounded by the indictment. It was impossible for Dr. Ketchum to know what he was defending against.

Important facts such as the following cannot be determined from the indictment:

(1) Whether length of pregnancy will be at issue;

(2) Whether the type of facility and equipment in it will be disputed;

(3) Whether the availability or use of blood or other fluids will come up;

(4) What the definition and nature of a "vaginal hysterotomy" will be;

(5) Whether the proximity to a hospital will be pertinent.

Each of the above matters may or may not be relevant, may or may not have been decisive of whether Dr. Ketchum was convicted.

Just as in Rabe v. Washington, 405 U.S. 313, 316 (1972), a film exhibitor did not have "fair notice that criminal liability is dependent upon the place where the film is shown," so too

Dr. Ketchum had no notice of many more "circumstances" than clinic location. The unconstitutional vagueness is at least twenty-two fold more serious here than in Rabe.

The leading case on unconstitutionally vague indictments is Russell v. United States, 369 U.S. 749 (1962). There the Supreme Court set aside various convictions based on refusal to answer questions before a congressional subcommittee. In reversing the lower court, Justice Stewart for the Court stated:

> "Identification of the subject under inquiry is also an essential preliminary to the determination of a host of other issues which typically arise in prosecutions under the statute." 369 U.S. at 759.

In the present case, defense counsel could not refute, disprove, or discount "all the circumstances " until they knew what was intended. Similarly, the defense could not argue that Dr. Ketchum had rendered "proper medical care" [quote from Indictment] without knowing what the grand jury, prosecutor, or judge defined as proper or improper.

The Supreme Court in Russell further stressed that an indictment must contain "'the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet ....'" 369 U.S. at 763-64.

This was not done here. The indictment is supremely vague.

Both the indictment and the criminal negligence statute are replete with generic terminology. They do not define elements of the crime. One of the prosecution witnesses, Dr. Patterson, even admitted that a "vaginal hysterotomy," which is what Dr. Ketchum was charged with doing, was "not what was in the pathology

report." (R I:1056). In other words, Dr. Ketchum was charged with doing a different surgical procedure from that which in fact he did!

The pathology report on the condition of the patient's uterus did not support the indictment,but used the term "hysterectomy," which was a medical impossibility.

Not only were the elements of the offense left undefined up to and throughout the trial, but they may well have been quite different in the eyes of the grand jury from what they became in the presentation of the prosecutor.

As the Russell case cited earlier states:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury." 369 U.S. at 770.

"[U]nder all the circumstances," "proper medical care," "vaginal hysterotomy," "gross deviation," and "reasonable standard of care," as applied to conduct constitutionally privileged by Roe v. Wade, all provided Dr. Ketchum with little fair notice and the prosecutor with vast leeway to define the crime as trial progressed. This case, like Russell, was one in which the indictment and statute "left the prosecution free to roam at large - to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 369 U.S. at 768. If one of his choice elements of the crime did not hold up on cross-examination, he could move on to another. The defense,

however, was left to guess at what new element would be next suggested. That was the entire course of this trial.

Russell is but one of many significant decisions on due process or equivalent aspects of indefinite indictments.

An early decision, United States v. Carll, 105 U.S. (15 Otto) 611 (1882), stressed "the necessity of alleging in the indictment all the facts necessary to bring the case within that [statutory] intent." United States v. Cruikshank, 92 U.S. 542, 558 (1875), had earlier held that if the statute "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms .... [I]t must state the species, - it must descend to the particulars." See also United States v. Hess, 124 U.S. 483 (1888); United States v. Simmons, 96 U.S. 360 (1877).

In this Indictment there are no specifics, not one. There is nothing concrete about "all the circumstances," "proper medical care," "gross deviation," and the like. Even the nature of a "vaginal hysterotomy" was vague, particularly after the prosecution realized they had not charged the operative procedure which was performed. Prosecution medical expert, Dr. Patterson, admitted that "there are different techniques and I am not familiar with Dr. Ketchum's technique of doing it." (R II:1056-57). In "describing the procedure" of a vaginal hysterotomy, Dr. Patterson admitted it was "not what was in the pathology report." (Id.). In other words, it was not the procedure Dr. Ketchum had performed, but only that for which he had been indicted!

United States v. Silverman, 430 F.2d 106, 110 (2d Cir. 1970), explains the applicability of federal indictment vagueness cases to state due process arguments:

> "Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment contain 'a plain, concise and definite written statement of the essential facts constituting the offense charged.' This requirement performs three constitutionally required functions. It permits the accused 'to be informed of the nature and cause of the accusation' as required by the Sixth Amendment. It prevents any person from being 'subject for the same offense to be twice put in jeopardy of life or limb' as required by the Fifth Amendment. Finally, it preserves the protection given by the Fifth Amendment from being 'held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."' 8 Moore, Federal Practice ¶7.04 at 7-15 (1969)."

Such specificity avoids the problem of a trial starting out on one theory and progressing through several other not spelled out in the indictment, as occurred here.

In the present case the varying and unspecified elements of the crime shifted constantly with proof. Access to whole blood at Dr. Ketchum's clinic was a big issue to start with (R I:59) until Dr. Patterson admitted that the abortion clinic upstairs, manned by local physicians, also had no blood. (R II:1104).

Similarly, duration of pregnancy came into the case early (R I:58). No specific range was charged. The prosecutor simply tried to maximize the duration (R II:1148), and the defense to minimize (R I:200). Estimates ranged from 12 to 20 weeks (R III: 1488, 1502; II:1041). Surely Dr. Ketchum had a right to be told whether the prosecution was claiming 14 or 20 weeks, a difference of possible serious consequence.

The Indictment fails to meet the minimum requirements of definiteness. What Van Liew v. United States, 321 F.2d 664 (5th

1963), said about "the infinite variety" of foods is true about the complexities of medical practice. "[T]he District Attorney is not the Grand Jury, and he may not determine what it is that the Grand Jury has charged." 321 F.2d at 672.

D. INSUFFICIENCY OF THE BILL OF PARTICULARS

The State argues that a Bill of Particulars somehow removed all uncertainty. Not only does it provide little guidance, and that open-ended, but "it is a settled rule that a bill of particulars cannot save an invalid indictment." Russell v. United States, supra, 369 U.S. at 770.

Russell disposes of this issue, but a few examples of vagueness and circuitry in the bill of particulars are informative.

Appellant's first request for a bill is set out in the Record (R IV:2753). The order granting the bill is at p. 2765, and the bill itself at p. 2767. A second request for particulars, over-ruled is at p. 2783.

Item 1 in the bill of particulars defines "vaginal hysterotomy" as "an incision of the uterus." Yet, the medical examiner's and the pathology reports, People's Exhibit 20, described "an incision into the cervix ...." The former proported to have been ascertained from the latter. But the cervix is to the uterus what the neck is to the head - a different part of the body!

Item 3 of the bill of particulars was to have the "circumstances surrounding the instant case" thought to amount to a crime.

The response, A-H, not only was out of line with Roe v. Wade and Doe v. Bolton, but appeared taken from the regulations held unconstitutional in People v. Dobbs Ferry! Duration of the deceased patient's pregnancy was not mentioned, but "blood and blood derivatives" (R IV:2768) were still in the picture.

Item 4, relative to aftercare, brought forth a direction to read "all of the Grand Jury testimony of both medical and lay witnesses ...." (R IV:2769).

The statute, indictment, bill of particulars, and case law nowhere advised Dr. Ketchum of the elements of the offense. This omission points to an elementary violation of Dr. Ketchum's due process right under the Fourteenth Amendment to be informed of what he is charged with violating, and to present a defense. Such failure to inform a defendant of the elements of the offense requires reversal of Dr. Ketchum's conviction.

IV.

CONCLUSIONS

Dr. Ketchum has in common with every citizen a Federal constitutional right not to be prosecuted unless his conduct was proscribed by pre-existing legal standards as to which he had fair notice. He further has a right to be informed prior to trial of the nature and elements of the offense. These rights were asserted but ignored in the unconstitutional application of the criminal negligence statutes to Dr. Ketchum. His conviction must accordingly be set aside.

Dr. Ketchum further has a Federal constitutional right to a fair trial, not a perfect trial, but not one so permeated with the systematic grievous misconduct and irregularities which run rampant throughout this Record. This right, too, was asserted but ignored in the State courts. On the alternate ground of grossly unfair trial, the conviction must be set aside.

This Court should reverse the lower court's denial of the petition for writ of habeas corpus, vacate the conviction, and grant other necessary and just relief.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

This BRIEF has been served upon all counsel for Appellees by First Class mail sent by the undersigned this 3rd day of February, 1977, to Judith Blake Manzella, Esq., Assistant District Attorney, Chief, Appeals Bureau, 200 Erie County Hall, 25 Delaware Avenue, Buffalo, New York 14202 and Hon. Louis J. Lefkowitz and Douglas Cream, Esq., Office of the Attorney General, 65 Court Street, Buffalo, New York 14202.

By: Roy Lucas

Roy Lucas